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REPORT OF LEGAL ANALYSIS AND OPINIONS

COMMONWEALTH OF MASSACHUSETTS SPECIAL LEGISLATIVE COMMISSION ON LOW-LEVEL RADIOACTIVE WASTE

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management or disposal facility?

B. What standards of liability apply to such parties?

C. Is the list of potentially liable parties and their standard of liability affected if the facility is located on federally owned property or if the facility is owned or operated by a state authority?

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1. MASSACHUSETTS IS EXPLORING "GOING IT ALONE" AS AN ALTERNATIVE TO ENTERING AN INTERSTATE COMPACT FOR THE MANAGEMENT AND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE.

IF MASSACHUSETTS DOES NOT JOIN A COMPACT, CAN IT EXCLUDE--BY STATUTE OR OTHER MEANS--OUT-OF-STATE WASTES FROM BEING DISPOSED OF WITHIN MASSACHUSETTS WITHOUT VIOLATING FEDERAL LAWS OR REGULATIONS?

The Low-Level Radioactive Waste Policy Act of 1980, Public Law 96-573, 94 Stat. 3347, codified at 42 U.S.C. secs. 2021b-2021d (hereinafter referred to as the "Policy Act") provides:

> It is the policy of the Federal Government that...each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders.... 48 U.S.C. sec. 2021d.

The Policy Act is widely understood as expressing the preference that States meet this policy by interstate compact. If the compact strategy is utilized, the Policy Act provides:

> After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region. Id.

This provision may be regarded as an incentive for the States to enter into interstate compacts in that it offers the support of the Congress to a compact provision which limits access to a regional low-level waste facility to compact party states. By implication, Congress appears to be opposing any assertion by an

individual state of the right to limit access to a state facility to wastes generated within its borders.

Note that the Policy Act does not contain an express prohibition against such a limit and, indeed, the policy statement quoted above appears to be at least partially inconsistent with such a prohibition. Nevertheless, the Policy Act does contain a message to the states: Join a compact and enjoy the right to limit the wastes managed at a regional facility, or go it alone and take the risk that your state will become a low-level waste dumping ground.

The Policy Act does not necessarily resolve the question of whether out-of-state or out-of-region waste can be constitutionally excluded from a low-level waste facility. It is conceivable that an exclusion, contained in an interstate compact authorized and approved by Congress, would still be found to violate the Constitution. Obviously, the approval of Congress does not always mean that no constitutional violation has occurred.

On the other hand, it is also conceivable that a state exclusion would be upheld in the courts and not be found unconstitutional. The conclusion drawn from the analysis contained in this section of the report is not that one type of exclusion is constitutionally permissable and the other is impermissable. Rather, the conclusion is that the go-it-alone strategy raises more potential consitutional obstacles and is more likely to engender constitutional opposition than the regional compact strategy. For this reason, the go-it-alone strategy should be regarded as constitutionally problemmatic.

Massachusetts cannot embark on the go-it-alone strategy with the assurance that it will be entitled to exclude out-of-state waste from a facility it develops.

Many of the issues presented here were considered in the case of Washington State Building and Construction Trades Council, AFL-CIO v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied sub nom. Don't Waste Washington Legal Defense Council v. Washington, 103 S.Ct. 1891 (1983). That case was a suit challenging the constitutionality of a Washington statute prohibiting the transportation and storage within the state of radioactive waste produced outside the state. The court ruled that the statute was unconstitutional because it violated by the Commerce Clause and the Supremacy Clause of the U.S. Constitution.

The Commerce Clause

The Commerce Clause appears in Article 1, sec. 8 of the Constitution. It provides, in relevant part:

> The Congress shall have Power...to regulate commerce with foreign nations, and among the several States....

The clause has been given two principal meanings by the courts: First, it obviously authorizes Congress to adopt legislation to regulate interstate commerce. Second, and less obviously, it prohibits state actions which unreasonably burden or discriminate against interstate commerce. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

The U.S. Supreme Court has frequently dealt with cases in which this second meaning of the commerce clause has been at

issue. In Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1980), the Court articulated a test which can be used to determine whether a state action unnecessarily burdens or discriminates against interstate commerce:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

In Trades Council v. Spellman, the Ninth Circuit applied the three parts of this test to the Washington exclusion of out-of-state waste. With respect to the "even-handedness" criterion, the court stated:

> Low-level waste from within Washington and that traveling through the state are exempted from the initiative. Only out-of-state waste bound for disposal in Washington is banned. Such uneven treatment of in-state and out-of-state parties fails the first part of the Pike test.
>
> This facial discrimination, in turn, "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). The initiative cannot withstand this level of scrutiny. 684 F.2d at 631.

Similar rationales were used to invalidate a ban on the importation of ordinary solid waste in City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), and a ban on importation of spent nuclear fuel in Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1982), cert. denied sub nom. Hartigan v. General Electric Co., 103 S.Ct. 1891 (1983).

Nevertheless, if Massachusetts were to develop its own low-level waste facility and to limit access to in-state generators, it would not necessarily fair as poorly on this part of the test.

While Washington, New Jersey and Illinois sought to exclude waste from all other states, the Massachusetts exclusion would likely arise in a context where other states' regional compacts also exclude exportation of waste outside their region. Thus, the Massachusetts exclusion, in at least some contexts, would impose restrictions on other states no more burdensome than what they are imposing on themselves. In such circumstances, it is less clear than it was in Trades Council v. Spellman that the Massachusetts exclusion would fail the even-handedness portion of the Commerce Clause test.

The second part of the test articulated in Pike v. Bruce Church focused on whether the provision at issue accomplishes a legitimate local public purpose. In Trades Council v. Spellman, the court applied this criterion to the Washington law and observed;

> The state relies upon the proposition that "releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of Washington...." Initiative 383, sec. 1. Undoubtedly, the release of radioactive materials and emissions is inimical to the safety of the people of any state. The State of Washington neglects to address, however, the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures. Initiative 383, therefore, also fails the second part of the Pike test. 684 F.2d at 631.

In some respects, therefore, the inadequacy of the Washington law derives from a drafting deficiency. A Massachusetts exclusion, in contrast, could be formulated with a legitimate local public purpose: preserving a scarce economic resource for use by state industry which requires it. This

purpose might well carry additional weight in the courts if Massachusetts chooses a go-it-alone strategy after trying, but failing, to negotiate a compact with nearby states. In such circumstances, the state could well argue that it must provide in the best way it can for the disposal needs of its resident businesses (which, it may be recalled, lead the nation in both the volume and radioactivity of the low-level waste they generate). Having failed to achieve a regional solution to this problem, this argument would go,the only alternative available to the state is to limit access to the facility it has.

Finally, the third part of the test in Pike v. Bruce Church inquires whether the state enactment has more than an incidental effect on interstate commerce. Applying this criterion, the court in Trades Counsil v. Spellman stated:

> Initiative 383 has more than an incidental effect on interstate commerce. Washington receives two-fifths of the country's low-level radioactive waste and has the only site currently available to receive absorbed-liquid low-level waste. Closing Washington's borders would significantly aggravate the national problem of low-level waste disposal. Thus, 383 fails to meet the last part of the Pike test and violates the Commerce Clause. 684 F.2d at 631.

On this point, a Massachusetts facility would most strikingly differ from the facility at issue in Trades Council v. Spellman. Massachusetts' go-it-alone strategy would arise only in the context where most other states were making other arrangements for disposal of their low-level waste. It seems less likely in the future than it is today that a single facility would be called upon to accept 40% of the low-level wastes of the entire country.

On the basis of this analysis, it is possible to conclude that a Massachusetts statutory prohibition against the importation of low-level waste would better withstand a Commerce Clause challenge than did the comparable Washington prohibition. This is not to say, however, that the prohibition would be sure--or even likely--to be upheld. The best conclusion that can be drawn from existing case law is that the arguments which led to the invalidation of the Washington state ban on low-level waste importation would apply, but with less compelling force, to a comparable Massachusetts ban.

In Trades Council v. Spellman, the court noted two "exceptions" to the Commerce Clause. The more important of these is the "market participant" exception. The Supreme Court considered this exception in Reeves, Inc v. Stake, 447 U.S. 449 (1980). That case involved South Dakota's refusal to sell cement manufactured at a state-owned plant to out-of-state users until all in-state demands were satisfied. The Supreme Court held that a state, when acting as a market participant rather than a market regulator, is free to discriminate in favor of its own citizens and against interstate commerce.

By analogy, Massachusetts might be able to develop a low-level waste facility, operate it on its own orlease it to a private operator, and restrict access to it, not by regulation, but by the same means that any other market participant might choose to restrict its clientele. This possibility was expressly left open in Philadelphia v. New Jersey, supra, 437 U.S. at 627, n.6.

The application of the market participant exception was rejected in Trades Council v. Spellman where the court stated:

> The State's contention that it is a "market participant," thereby placing the intiative beyond the reach of the Commerce Clause, is unconvincing. The state argues that 383 is a proprietary measure enacted to limit the state's participation in the waste disposal market. Whether or not the State is a proprietor of the Richland site, the intiative is cast in state regulatory rather than in proprietary terms. The measure is based on public safety rather than on economic considerations. The measure denies entry of waste at the state's borders rather than at the site the State is operating as a market participant. The measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce. 684 F.2d at 631.

However, the language quoted seems to indicate that a proprietary restriction would stand on a different footing than the regulatory prohibition clearly before the court. Thus, the decision seems to support the ability of Massachusetts to resrict access to a state low-level waste facility as a market participant, rather than as a market regulator. Nevertheless, dictum in Reeves v. Stake casts doubt on this ability. The court there distinguished the proprietary decision to limit access to the South Dakota cement plant from a state's attempt to hoard a commodity or natural resource for its own citizens. The Court specifically cited Philadelphia v. New Jersey, supra, and listed landfill sites as an example of a natural resource that could not constitutionally be hoarded.

Thus, while it can be argued that Massachusetts might succeed with a go-it-alone strategy of limiting acces to its low-level waste facility, this conclusion is certainly not free of doubt. If Massachusetts wishes to assume the risk of a go-it-alone strategy, it is possible that

the strategy will permit it to exclude out-of-state waste. This possibility is not a guarantee, however, and Massachusetts would have to adopt the go-it-alone strategy without the assurance that its right to exclude out-of-state wastes would be upheld.

The Supremacy Clause

The Supremacy Clause is contained in Article VI of the Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Like the Commerce Clause, the Supremacy Clause has, over the years, been given two principal meanings: First, its obvious meaning is that any state enactment which directly conflicts with a federal law or regulation is invalid. Second, no state may enact legislation governing any subject matter if the regulation of that subject matter has been preempted by federal law. Rice v. Santa Fe Elevator Corp., 331 U.S. 318 (1947).

The dominant federal legislation pertaining to radioactive waste is the Atomic Energy Act of 1954, 42 U.S.C. secs. 2011-2096. In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 103 S.Ct. 1713 (1983), the U.S. Supreme Court's most recent statement on the scope of that Act, the Court observed:

> [T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.

The Court in that case was faced with a state moratorium on the construction of nuclear power plants until a federally approved method for disposing of the wastes generated by such plants is available. The Court stated:

> When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government." Rice v. Santa Fe Elevator Corp., supra, 331 U.S. at 236. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field.
>
> * * *
>
> [W]e accept California's avowed economic purpose as the rationale for enacting sec. 25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation. 103 S.Ct. at 1725-27. 1728.

The dichotomy drawn in Pacific Gas v. Energy Resources Commission is clearly between safety regulation of nuclear facilities, a field preempted by Congress, and economic regualtion of such facilities, which the state may continue to undertake, despite the Atomic Energy Act. This dichotomy does not appear to be recognized in the portion of the Trades Council v. Spellman decision dealing with the Supremacy Clause.

In Trades Council v. Spellman, the Ninth Circuit ruled that Washington's legislative prohibition on the importation of low-level waste "violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act" 684 F.2d at 630. The court took note of the Low-Level Radioactive Waste Policy Act and the provision of the Atomic Energy Act authorizing the federal government to contract with states for the operation of radioactive waste disposal facilities. The court stated, however:

> Neither...is a grant of total authority to the states over the disposal of low-level wastes within their own borders.
>
> The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject. Id.

Again, however, the mere fact that the Washington regulatory ban on waste importation was invalidated under the Supremacy Clause does not necessarily mean that a Massachusetts ban on out-of-state wastes would similarly be invalid. Note that the Pacific Gas V. Energy Resources Commission decision expressly limits the extent of federal preemption to matters of nuclear safety. Under the rationale of that decision, therefore, the Washington state ban would fall, because it was expressly an effort to remedy a perceived safety problem. Indeed, the ban itself stated that "releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of Washington." quoted at 584 F.2d at 631.

In contrast, a Massachusetts ban carefully drafted to take advantage of the implied invitation of Pacific Gas v. Energy Resources Commission, to regulate the economics of atomic energy and radioactive waste, seems more likely than the Washinton ban to be sustained in the courts. This is not to say that such a ban is sure to be sustained, but only that it is possible to draw a ban more precisely and aimed more squarely at constitutionally permissable objectives than the Washington ban. If Massachusetts were to select this strategy, it would stand a greater chance of being upheld in the courts, but this chance would not be a certainty.

Conclusion

The risks of going it alone cannot be discounted on the basis of current law. While it is possible to structure arguments that a Massachusetts ban would differ from other state bans which have been struck down by the courts, and thus be constitutionally valid, the ultimate acceptance of these arguments is a matter of conjecture. On balance, the more prudent constitutional course is to accept the invitation of the Low-Level Policy Act to join an interstate compact, and to avoid the unnecessary risk of going it alone.

2A. MASSACHUSETTS IS ALSO EXPLORING VARIOUS ALTERNATIVES WHICH WOULD INVOLVE JOINING AN INTERSTATE COMPACT. IN WHAT WAYS DOES THE MASSACHUSETTS CONSTITUTION RESTRICT THE PROVISIONS OF AN INTERSTATE COMPACT FOR THE MANGEMENT AND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE ENTERED INTO BY THE COMMONWEALTH?

In section 2B of this report it is observed that an interstate compact, consented to by Congress, is a federal law. In section 3B, it is concluded that, because a compact is federal law, any irreconcilable conflict between the compact and a provision of state law will lead to the invalidation of, or refusal to apply the state law. This is true even if the conflict is between the compact and a provision of the state Constitution. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951). Thus, in one sense, the question posed in this section is off point. If a compact is negotiated and approved by Congress, any subsequent assertion that it conflicts with state constitutional provisions will likely be rejected by the courts.

Nevertheless, a state adopts a compact by enacting state legislation. If that legislation is beyond the power of the legislature to adopt, then the compact has not been properly adopted and, at least until the compact is accepted by Congress, is subject to challenge in the courts. Thus, the existing

provisions of the Massachusetts constitution do apply to the adoption of an interstate compact, and may restrict the types of provisions that can be constitutionally employed.

Nondelegation

Article 30 of the Massachusetts Declaration of Rights provides:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Part 2, Article 4, Section 1 of the Constitution adds:

> [F]ull power and authority are hereby given and granted to the general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof;....

Together, these two provisions have been held to embody the constitutional doctrine of nondelegation. Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976). Despite its name, this doctrine does not mean that the legistlature is without the authority to delegate powers to other branches of state government, to political subdivisions or even to private individuals. Clearly the legislature has the power to adopt a general policy by legislation and to delegate to others the administration of the details of that policy. Grace v. Town of Brookline, 379 Mass. 43, 399 N.E.2d 1038 (1977).

Such a delegation may certainly be made to a state agency or

an individual state official, Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Co., 348 Mass. 538, 544, 205 N.E.2d 346 (1965), or it may be made to a city or town. Marshal House, Inc. v. Rent Control Board, 358 Mass. 686, 698, 266 N.E.2d 876, 885 (1971). However, an interstate compact may call for a delegtion to a regional commission which is neither precisely a state agency or official nor a political subdivision of the state.

While no state decision squarely considers the constitutionality of such a delegation, the decision in Arlington v. Board of Conciliation, supra, is nevertheless informative on the issue. In that case, the Supreme Judicial Court considered a challenge to a statutory provision (since repealed) requiring cities and towns to submit salary collective bargaining impasses with their police or firefighters to binding arbitration. The Town of Arlington sought a declaration that this provision unconstitutionally delegated legislative power to private persons (independent arbitrators). The court rejected this claim, however, stating that "delegations to private persons are not forbidden so long as proper safeguards are provided." 370 Mass. at 777. The Court then added:

> We are less concerned with the labels placed on the arbitrators as public or private, as politically accountable or independent, than we are with "the totality of the protection against arbitrariness" provided in the statutory scheme. K.C. Davis, Administrative Law Treatise 54 (Supp. 1970). As indicated above, the safeguards against arbitrary action in the statutory scheme are extensive, and they provide the act with a sound constitutional basis. In sum, we do not view the act as an improper delegation of legislative authority. Id.

The court thus relied heavily on the fact that the act had defined a detailed framework within which the arbitrators were to act, as well as ten specific standards to guide them in making their decisions. Id.

While existing case law does not precisely define the status of an interstate commission under state law, it seems unlikely that such a commission, created by state statute, would be less able to accept a delegation of state authority than a private individual, otherwise totally unaffiliated with state government. Thus, asusming that sufficient "guidelines, standards and proceedings [to] protect against arbitrary action" are provided, 370 Mass. at 776, a delegation to an interstate commission seems to be constitutionally permissable. Such guidelines should include a specification of the substantive basis for permissible commission decisions, as well as the procedures to be followed in making those decisions.

This does not mean that Massachusetts can feel free to enter into a compact which purports to delegate to an interstate commission the full range of legislative powers. Some legislative powers may not be constitutionally delegted to any person or body, public or private. The legislative power to appropriate money, for example, cannot be delegated. Opinion of the Justices, 302 Mass. 605, 19 N.E.2d 807 (1939). Nor can the general law-making power of the legislature be delegated. Attorney General v. Brissenden, 271 Mass. 172, 180, 171 N.E. 82 (1930). However, should the legislature choose to delegate to an interstate commission the power to administer the details of an interstate compact, the constitution demands no more than that

sufficient safeguards against arbitrary action be included in the delegation.

Separation of Powers

Article 30 of the Declaration of Rights, quoted supra, also embodies the principle of separation or powers, which is closely related to the nondelegation principle discussed above.

If an interstate commission were established by compact, and a sum of money granted to it to be expended as it sees fit, the question arises as to whether this arrangement violates the separation of powers principle. As noted, the power to appropriate money is a legislative power, which can be exercised only by the General Court. Nevertheless, while the legislative power to appropriate money cannot be delegated or turned over to another branch of government, the Supreme Judicial Court, in Opinion of the Justice, supra, stated:

> Undoubtedly the General Court in the exercise of its legislative power could appropriate money of the Commonwealth to meet "unforseen conditions" arising in connection with specific objects of appropriation and determine the particular objects for which the money so appropriated should be used.
>
> * * *
>
> [T]he General Court in the exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail the particular purposes for which money appropriated shall be expended or, on the other hand, will permit exeuctive or administrative offices or boards to exercise judgment and discretion for a given object to accomplish the general purposes of the appropriation. 302 Mass. at 615.

Thus, there appears to be no constitutional barrier to an interstate commission's deciding on its own how a sum of money granted to it by the legislature will be spent.

Binding Future Legislatures

A corollary to the doctrine of nondelegation is that one General Court cannot bind itself or its successors to future exercises of legislative power. Opinion of the Justices, supra. This corollary is particularly relevant to an interstate compact which will require future appropriations if it is to function adequately. There is no way that the legislture can bind itself to make the necessary appropriations in the future.

This fact need not prove to be an insurmountable one for a properly drafted compact, however. The necessary initial appropriations needed to implement the compact can be made as part of the ratification process. Later funding can be required as a condition of continued participation in the benefits of the compact without violating the principle outlined here. Thus, while a compact cannot include a provision directly requiring Massachusetts to appropriate funds to support its implementation in the future, the practical equivalent of such a provision can be incorporated.

Home Rule

Article 89, amending Article 2 of the Amendments to the Constitution of the Commonwealth provides:

> Section 6. Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the consitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter....

* * *

Section 8. The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws....

While the Home Rule amendment is designed to reserve to the cities and towns of the Commonwealth the power to exercise control over their purely local concerns, the Supreme Judicial Court has made it clear that the legislature still "may restrict local legislative action or deny municipalities power to act at all...." Bloom v. City of Worcester, 363 Mass. 136, 144 n.4, 294 N.E.2d 268, 274 (1973). Indeed, the Court has stated that "while the scope ofthe authority granted to municipalities to act on municipal problems is very broad, the scope of the disability is quite narrow." Arlington v. Board of Conciliation, supra, 370 Mass. at 773. In principle, there is no reason that the legislature whould be less able to restrict local legislation when it is adopting an interstate compact than when it is adopting any other type of legislation.

The leading case in which a conflict between state and local actions was resolved under the Home Rule Amendment is Board of Appeals v. Housing Appeals Committee, 363 Mass. 339, 294 N.E.2d 393 (1973). That case involved separate appeals, by the Boards of Appeals of two towns, of decisions of the Housing Appeals Committee granting applications for comprehensive permits to build low and moderte income housing within those towns. The Committee was set up by a statute which enabled it to supersede restrictive local zoning requirements if it found that such

requirements were preventing the construction of needed low and moderate income housing. The Supreme Judicial Court rejected the appeals, stating:

> [M]unicipalities can pass zoning ordinances or by-laws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature.... 356 Mass. at 360.

Thus, the Home Rule Amendment's grant of power to cities and towns to exercise legislative power with respect to local matters is not unlimited. When a legal or practical conflict arises between a local enactment and a state law or policy, the local enactment must yield to that of the state. Thus, for example, in an Opinion of the Justices, 356 Mass. 775, 250 N.E.2d 547 (1969), in which the Supreme Judicial Court considered proposed legislation providing for the financing and operation in Boston of a stadium complex, vehicular tunnel, toll road and arena, the Court stated:

> If the predominant purposes of a bill are to achieve State, regional, or general objectives, we think that...the Legislature possesses legisltive power unaffected by the restrictions in art. 89, sec. 8. 356 Mass. at 788.

On the other hand, the court noted, when the legislature takes action on a purely local matter, section 8 of Article 89 may well be violated. For the most part, a regional compact providing for the management of low-level radioactive waste will clearly serve "State, regional or general objectives." It is possible to conceive, however, of a compact provision which unduly invades the local authority preserved by the Home Rule Amendment. Nevertheless, with the exception of prohibiting such a provision,

the Home Rule Amendment should not greatly affect the permissible provisions of an interstate compact.

Conclusion

State Constitutional restrictions pose only modest burdens on the negotiation of interstate compacts. To the extent that such compacts delegate administrative authority to an interstate commission, the Constitution demands that adequate safeguards against arbitrary action been incorporated into the delegation. In addition, delegations of the law-making and appropriation powers of the legislature are prohibited, as are attempts to bind future legislatures to pass laws or make appropriattons. Finally, as long at the provisions of the compact affect state, regional or general interests only, the Home Rule Amendment will not stand as an impediment to any invasion of local power which results from a compact.

2B. IN WHAT WAYS MAY EXISTING FEDERAL LAWS AND REGULATIONS RESTRICT THE PROVISIONS OF SUCH AN INTERSTATE COMPACT?

The Low-Level Policy Act authorizes states to enter into compacts providing for "the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 U.S.C. sec. 2021d. Beyond this specification that disposal facilities be "regional" and be for "low-level radioactive waste," the Policy Act provides four principal restrictions upon the authorized interstate compacts:

a) To take effect, such compacts must be consented to by the Congress "by law." 42 U.S.C. sec. 2021d.

b) Such compacts must provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. Id.

c) Regional disposal facilities may be restricted to disposal of waste generated within the region only after January 1, 1986. Id.

d) Such compact shall not apply to transportation, disposal, management or waste from: (1) "atomic energy defense activities" as defined in the Policy Act; or (2) "Federal research and development activities" (a term that is not defined in the Policy Act). 42 U.S.C. sec. 2021c.

The Scope of Disposal Activities under the Policy Act

As noted the Policy Act's authorization of regional compacts extends to "the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 USC sec. 2021d.

The term "disposal" is defined in the Act to mean "the isolation of lowplevel nuclear waste pursuant to requirements established by the Nuclear Regulatory Commission under applicable laws." 42 USC se. 2021b. The Act does not define "establishment and operation," however.

Two questions may thus arise: First, did Congress intend to limit the scope of the disposal activities that may be undertaken through the interstate authorized by the Act? Second, assuming such a limit, may compact states negotiate compacts that go beyond the Policy Act limit?

The legislative history of the Policy Act gives no clear answer to the first question. The Act originated as a minor portion of broader legislation addressing a wide range of issues concerning transporation, storage, reprocessing, encapsulation and long-term, monitored, retrievable storage of high-level nuclear waste. The language of the Act originated in a House bill proposing a comprehensive "Nuclear Waste Policy Act." On December 13, however, the Senate chose to delete the high-level waste provisions from the bill, leaving only the low-level provisions as they originated in the House bill. See Congressional Record, Daily Edition at S16539-S16546 (Dec. 13, 1980). The House concurred in the Senate substitute. Congressional Record, Daily Edition at H12494-H12497 (Dec. 16, 1980).

The low-level waste compact provisions of this bill were not debated in either the House or Senate except to observe that although Congress had not been able to adopt the high-level waste

policy provisions, there was an urgent need to proceed with the development of interstate compacts to deal with low-level waste disposal. The difference in language in a parallel Senate bill was neither questioned nor explained at any point in the floor debate. That bill defined "nuclear waste. . .management" to mean "transport, storage and disposal of nuclear waste" and authorized and encouraged states "to develop and submit to the Congress, for subsequent review and consent, agreements or compacts. . . relating to the management and disposal of low-level radioactive waste on a regional basis."

The legislative history of the Policy Act thus offers some basis for viewing the term "establishment and operation of facilities" as embracing at least the means of transportation and temporary storage of waste, as well as long-term disposal. Whether the concept of waste management might extend also to reprocessing, recycling or reduction of waste production might be questioned, however, since nothing in the legislative history of the Act suggests that such activities were contemplated by Congress.

Thus, there is a need to ask whether a regional compact may include waste management functions not contemplated in the Policy Act. Although the Policy Act has authorized comapcts of a specific nature, it does not preclude states from negotiating compacts on broader issues. Note that the Compact Clause permits states to negotiate, and Congress to approve, any compact not inconsistent with the Constitution. Once a broader comapct is negotiated by states and approved by the Congress, that compact would be a valid congressionally approved interstate compact,

having a status equivalent to that of a compact approved by Congress pursuant to the Policy Act.

A regional compact that encompasses topics broader than those contemplated in the Policy Act may present special isues for debate in subsequent congressional consideration of the compact. Nevertheless, the mere fact of any inconsistency with the Policy Act does not impair the ability of the state to negotiate and agree upon such terms.

The Federal Law Status of Congressionally Approved Interstate Compacts

The Policy Act requirement that Congress consent to regional waste disposal facility compacts "by law" resolves the threshold question of the status of such compacts. Not all interstate agreements are "compacts" that require congressional consent under the Compact Clause of the Constitution. Indeed, it may sometimes be difficult to distinguish constitutional "compacts" from other interstate agreements. See Engdahl, "Characterization of Interstate Agreements: When is a Compact Not a Compact?;" 64 Mich. L. Rev. 63 (1965). The Supreme Court has recently made clear, however, that congressional approval of interstate agreements in the manner provided for by the Policy Act brings such agreements within the class of interstate agreements governed by the Compact Clause. In Cuyler v. Adams, 449 U.S. 433, 440 (981), a case raising questions as to the interpretation of the Interstate Agreement on Detainers, the Court stated:

> [W]here congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional

legislation, the consent of Congress transforms the State's agreement into federal law under the Compact Clause.

The transformation of a regional waste low-level waste agreement into federal law by congressinal approval has three principal consequences relevant to its drafting of the agreement: First, apart from any conditions imposed upon the compact by the Policy Act or by the congress consent to the compact, the compact may include any terms or conditions that are not inconsistent with the Constitution of the United States. Second, although the compact is negotiated and agreed to as a contract or agreement between its party states, the transformation of the compact into federal law by congressional consent means that questions of compact interpretation are governed by federal law. Third, the federal law character of the compact also means that issues of interpretation are questions "arising under" federal law for purposes of the "federal" question jurisdiction of the federal courts.

The first two of these consequences are discussed in this section. The issue of federl court jurisdiction over questions arising under the compact is addressed in section 4B of this report.

The Compact as Federal Law

As noted, the act of Congress consenting to a compact transforms the compact into federal law. The compact is not itself an act of Congress but, because the compact is both authorized and consented to by acts of Congress, it may lawfully

contain any provisions that are not prohibited by the Constitution. Clearly the full range of constitutional provisions constrain the terms of a compact. For example, action under the compact must accord due proces of law in respect of affected liberty and property interests, and may not impair the obligation of contracts. See U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452, 478-79 (1978)(applying the Commerce Clause and the 14th Amendment to the Multistate Tax Compact, an interstate agreement held not to require congressional approval under the Compact Clause).

The restraints that have been imposed upon regional waste disposal facility compacts by the Policy Act are listed at the beginning of this section. A review of other federal legislation authorizing the negotiation of interstate compacts discloses no restrictions of general applicability that would constrain the terms of a regional low-level waste compact beyond the restrictions contained in the Policy Act.

The Act of Congress consenting to a specific regional low-level waste compact may, of course, impose conditions or restrictions upon the compact in addition to those contained in the Policy Act. In granting consent to interstate compacts, Congress has often imposed such conditions. For example, in consenting to a compact between Missouri and Tennessee creating a commission for the construction of a bridge and operation of ferries across th Mississippi River, Congress attached the following proviso:

> [N]othing herein contained shall be construed to...diminish any jurisdiction...of any court...of the

> United States, over or in regard to any...thing, forming the subject matter of the aforesaid compact.... Quoted from Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 277-78 (1959)(emphasis omitted).

Beyond such specific restrictions imposed by Acts of Congress, the question may arise whether provisions of general federal legislation contain conditions or restrictions that apply to the activities of a commission established under the regional low-level waste compact. Such legislated conditions or restrictions would fall into two categories: legislation applicable to state activities and legislation applicable to federal activities. Both possibilities may exist because the compact and the institutions it creates would be creatures of both state and federal law. The compact and its institutions would be creatures of state law because it is the states that negotiate and agree by statute to the terms of the compact. See, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)(holding that an agency created by interstate compact acts "under color of state law" within the meaning of the Civil Rights Act of 1871, 42 U.S.C. sec. 1983). However, the compact and its institutions would simultaneously be creatures of federal law because, as noted, congressional consent to the compact transforms the compact into federl law.

Federal Law Regulating State Agency Action

Some federal statutes are clear in providing either that they apply or that they do not apply to interstate compcts. See, e.g., 42 U.S.C. sec. 5112 (which authorizes the Secretary of Health and Human Services to issue "model adoption legislation

procedures which shall not be in conflict with the provisions of any interstate compact."); 42 U.S.C. sec. 8778 (which provides that nothing in the law establishing the U.S. Synthetic Fuels Corporation shall amend or modify interstate compacts relating to water rights); 42 U.S.C. sec. 4727 (which consents to interstate compacts for training programs for state and local officials, providing that such compacts do not conflict with any law of the United States). Other laws and regulations, however, say nothing about their application to interstate compacts. Such laws and regulations should normally apply to the activities of commissions created by interstate compact if the compact does not exempt such activities.

Therefore, if the regional low-level waste compact says nothing about the application of legislation governing state action generally, it should be presumed that actions taken pursuant to the compact must be consistent with such legislation. The compact brings several states together to accomplish its purpose through the joint exercise of state power with the assent of Congress, and actions taken pursuant to thecompact are state actions for the purposes of regulation by federal law. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra. Unless Congress exempts the compact from the requirements of federal law applicable to state action, any interstate commission acting under the compact ought generally to be subject to the requirements of such federal statutes.

Thus, when questions arise as to whether particular federal regulations apply to actions taken under a regional low-level

waste compact, the specific answer must be sought by asking: First, does the federal statute or regulation in question apply to action taken pursuant to interstate compacts? If the statute or regulation does not exempt action taken by state agencies, the answer should normally be "yes." Second, does the compact exclude the application of the statute or regulation to actions taken by an interstate commission created by the compact? If the compact does not specifically address the issue, the answer to this second question should normally be "no," with the result that action by the commission would be subject to the statute or regulation. Where the terms of the compact seem inconsistent with this conclusion, however, preclusion of the federal statute or regulation might be implied from the inconsistent compact terms.

The question of whether federal statutes and regulations apply to the actions of a commission created under an interstate compact is a question of federal law. This conclusion follows from the Supreme Court's holding that congressional consent to an interstate compact transforms the compact into federal law. Petty v. Tennessee-Missouri Bridge Commission, supra; Cuyler v. Adams, supra. See also Texas v. New Mexico, 103 S.Ct. 2558 (1983).

The foregoing indicates that care must be taken in drafting the regional low-level waste compact to address specific areas of federal law, if any, in which it is considered appropriate to exempt action taken by a commission created under the compact. Such questions should not be left to later determination, both because of the confusion likely to be created and because a later

determination will likely result in the commission's being subject to federal laws and regultions from which it has not been specifically exempted.

Federal Law Regulating Federal Agency Action

There remains the question of the application of federal laws and regulations governing federal agency action to a commission created under a congressionally approved interstate compact. In principle, such laws and regulations do not apply to such a commission. Although it is authorized by an act of Congress, an interstate commission is normally not regarded as subject to federal statutes designed to regulate the actions of federal agencies. Four examples will point up both the reasoning underlying this conclusion and potential limiting factors that raise questions as to whether some federal agency regulations might arguably apply to an interstate commission: The examples are the Federal Administrative Procedure Act, the Freedom of Information Act, the Federal Tort Claims Act, and the National Environmental Policy Act.

The Federal Administrative Procedure Act (APA), 5 U.S.C. secs. 551 et seq., defines the term "agency" to mean "each authority of the Government of the United States," with certain state exceptions not relevant here. 5 U.S.C. sec. 551(1). While it is clear that the APA does not apply to state agencies or to private organizations, it is sometimes argued that federal funding and extensive federal regulation can confer federal "agency" status on such bodies. In Forsham v. Harris, 445 U.S.

169 (1980), for example, plaintiffs seeking data generated, owned, and possessed by a privately controlled organization argued that federal funding made the private organization a federal "agency" as that term is used in the Freedom of Information Act (FOIA), 5 U.S.C. sec. 552(e), which incorporates the definition of "agency" contained in the APA. The Supreme Court rejected the claim, holding that the legislative history of FOIA "indicates unequivocally that private organizatiiions receiving federal financial assistance grants are not within the definition of 'agency.'" 445 U.S. at 179. In so holding, however, the Court stated:

> This treatment of federal grantees under the FOIA is consistent with congressional treatment of them in other areas of federal law. Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision. United States v. Orleans, 425 U.S. 807, 818 (1976). Measured by these standards, the UGDP is not a federal instrumentality or an FOIA agency. 445 U.S. at 180.

United States v. Orleans, cited by the Supreme Court in the quoted passage, involved tort damage claims brought against the United States under the Federal Tort Claims Act, 28 U.S.C. secs. 1346(b) and 2671 et seq. Plaintiffs argued that employees of a community action agency, organized as a non-profit corporation under Ohio law, were federal Government employees under the Tort Claims Act due to federal funding of the community action agency. The Supreme Court rejected the claim, noting that the Tort Claims Act defines Government employees to include employees of "any federal agency," but excludes "any contractor with the United States." 28 U.S.C. sec. 2671. The Court observed that a

"critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor.'" 425 U.S. at 814.

While it thus seems clear from United States v. Orleans that the Federal Tort Claims Act should not apply to an interstate compact agency, the abstraction from that case of the general principle stated in Forsham v. Harris, quoted above, may raise aquestion as to whether a regional commission under a low-level waste compact may be found to be an "agency" within the meaning of the APA and the FOIA. Moreover, the theory that "substantial federal supervision" might transform a non-federal entity into a "satellite federal agency" would have application beyond these statutes. The National Environmental Policy Act (NEPA), 42 U.S.C. secs. 4321 et seq., for example, applies simply to "all agencies of the Federal Government."

The argument that these statutes should apply to an interstate low-level waste commission would be that extensive federal regulation of the activities of such a commission, together with the federal-law status of the compact itself, renders the commission a federal "agency." This argument is strengthened by a footnote in Forsham v. Harris, 445 U.S. at 180, n.11, introducing the concept that federal supervision might turn a private entity into a "satellite federal ency." The Court stated that, while the "requisite magnitude of Government control" was not present in that case, "a threshold showing of substantial federal supervision" could characterize an entity as "federal" for some purposes.

Judicial reception of such an agreement, however, has not been favorable. In litigation involving the Tahoe Regional Planning Agency (TRPA), for example it has been finally established that TRPA is not an agency of the United States. See Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1362-63 (9th Cir. 1977), reversed on other grounds sub nom. Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); People of California v. City of South Lake Tahoe, 466 F.Supp. 527, 534-36 (E.D. Cali. 1978); and California Tahoe Regional Planning Agency v. Sahara Tahoe Corp, 504 F. Aupp. 751, 762-63 (D. Nev. 1980). The Ninth Circuit opinion found that the United States "has an extremely limited involvement with the Compact," being only its approval by Congress and the appointment by the President of a single non-voting representative to the interstate compact agency. 566 F.2d at 1362-63. The District Court opinions also relied upon the limited nautre of federal involvementin the activities of the TRPA. See 466 F.Supp. at 535, and 504 F.Supp. at 762-63.

The California federal court read the Jacobson opinion as reflecting "strong policy reasons for not implicating the federal government in the operation of interstate compacts merely because of the constitutional requirement of congressional consent to such compacts." 466 F.Supp. at 535. Referring to the "law of the Union" theory that congressional approval transforms interstate compacts into federal law, the District Court said:

> [G]iving the law of the Union doctrine expansive application would as a practical matter spell the death knell for interstate compacts, since stateswould understandably be reluctant to enter into agreements to solve regional problems if by doing so they would subject themselves to a

> host of federal regulations. Thus we reject plaintiff's argument that, by virtue of the law of the Union doctrine, TRPA is a federal agency within the meaning of NEPA. 466 F.Supp. at 535-36.

The later opinion of the federal District Court in Nevda, 504 F.Supp. 751, at 762-63, reached the same result but based its opinion more narrowly on the limited nature of federl government involvement in the Lake Tahoe compact agency.

The Lake Tahoe cases plainly address a situation distinguishable from the extensive federal supervision to be expected in the case of low-level radioactive waste disposal facilities. These caes therefore do not preclude a finding that a commission acting pursuant to a regional waste compact is a federal agency. Although Congress has stated that disosal of low-level waste is a state responsibility, state and interstate actions carrying out that responbility are likely to remain subject to federal control. Even if federal funds are not involved, federal supervision and control will exist at avery substantial level. The disposal facility will thus both be closely supervised by the federal government and function pursuant to a compact that has status as a federal law. Nevertheless, it remains a major step to conclude that existing federal statutes regulating federal agency actionapply to waste disposal actions taken pursuant to interstate compact.

Close federal supervision of a regional low-level waste commission could, however, form the basis for NEPA application on the theory that congressional approval of the regional compact rendered the regional facility a "major Federal action" for which an environmental impact statement would be required under NEPA 42

U.S.C. s. 4332(2)(c). Support for this theory can be found in decisions holding that state funded highway projects were subejct to NEPA due to federal involvement in the planning of the proposed highway and the approval of its route, even though federal funds were not used. See Sierra Club v. Volpe, 351 F.Supp. 1002 (N.D. Cal. 1972), and Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, 446 F. 2d 1013 (5th Cir. 1971).

Although federal statutes regulating federal agencies should not, in principle, apply to interstate compact agencies, substantial doubt about their applicability can be raised due to the close federal supervision of the activities of a regional commission relative to facilities for the management of low-level radioactive waste. The question of the application of such laws to the compact agency should therefore be resolved by the terms of the compact. Since the compact will be approved by the Congress and acquire status as federal law, the compact and its authorizing legislation may provide that specified federal laws either apply or do not apply to the activities of the compact agency. The clear resolution of this issue through the terms of the compact will avoid the considerable confusion and controversy that will otherwise almost certainly result from the expansion of the concept of federal "agency" indicated in recent cses decided under statutes regulating federal agency action.

Conclusion

The Low-Level Policy Act invites the states to enter into compacts for the establishment and operation of disposal

facilities. Nevertheless, if the states enter into a compact more broadly addressing low-level waste management, and Congress consents to such a compact, the Policy Act would in no way detract from its validity. The compact will be federal law and its interpretation will be a federal question. However, actions taken under the compact will remain state actions and subject to federal laws and regulations which apply to state actions. While the question is not free of doubt, federal statutes governing federal actions should not, in principle, apply to the activities undertaken pursuant to an interstate compact.

3A. WHAT MASSACHUSETTS LAWS AND REGULATIONS PRESENTLY APPLY TO THE GENERATION, STORAGE, TRANSPORTATION, MANAGEMENT, AND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE?

In this section of the report, the principal laws and regulations of the Commonwealth that directly affect the generation, handling and disposal of hazardous waste are considered. Clearly the laws of the Commonwealth are replete with provisions that could conceivably affect such activities in some circumstances. Only those laws and regulations with direct and substantial effects will be considered here, however.

Generation and Transportation

The comprehensive state statute dealing with all types of hazardous waste is the Hazardous Waste Management Act, G.L. ch. 21C. That Act applies to the generation, transportation and disposal of hazardous waste, which is defined as:

> . . .a waste or combination of wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illenss or pose a substantial present or potential hazard to human health, safety or welfare or to the environment when improperly treated, sorted, transported, used or disposed of, or otherwise managed, however not to include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act of 1967 as amended, or source, special nuclear, or byproduct

material as defined by the Atomic Energy Acts of 1954. (emphasis added).

Note that, while some radioactive waste is specifically excluded from this definition by the emphasized language, low-level waste is not so excluded. However, in keeping with the principle of federal authority over low-level waste, discussed in Secion I of this report, the Department of Environmental Quality Engineering (DEQE) has thus far not purported to exercise any authority over the generation, storage, transportation, management or disposal of such waste. Nevertheless, nothing in DEQE's regulations, 310 CMR 30.000, expressly exempts low-level waste from their coverage.

Thus, under current DEQE regulations, low-level waste generators need not register with the state; storage or accumulation of such waste is not restricted; and disposal is unregulated. Transporters need not be licensed, and only the federal Department of Transportation's standards for packaging and labelling apply. See 49 C.F.R. Parts 172, 173, 178 and 179.

A second statute that may affect low-level waste generation and transportation is the Hazardous Substances Labelling Law, M.G.L. ch. 94B. Despite its name, this law deals with more than just labelling. It authorizes the Commissioner of Public Health to designate certain substances as hazardous, and to require that such substances be labelled and conform to the Federal Hazardous Substance Act, 15 U.S.C. sec. 1261 et seq. It also authorizes the Commissioner to require the "removal from commerce" of any hazardous substance, if he finds that there is an imminent danger from the substance, or that its label is

inadequate to protect the public. Chapter 94B also authorizes the Commissioner to issue regulations banning certain hazardous substances from the Commonwealth entirely.

The Department's regulatory implementation of ch. 94B is codified at 105 CMR 650.000. The Department has designated only two hazardous substances under its regulations: formaldehyde and urea-formaldehyde foamed-in-place insulation (UFFI), and only UFFI is a banned hazardous substance at this time.

The Department of Public Health (DPH) also has authority under M.G.L. ch. 149 to issue regulations requiring reports from those who engage in the manufacture, possession or use of substances that are so hazardous to health as to warrant regulation of any storage in outdoor receptacles. Regulations issued by DPH under this authority, 105 CMR 610.000, set labelling requirements for these substances, but at present apply only to benzol, carbon tetrachloride, inorganic cyanides, carbon disulfide, methyl bromide, tetrachloroethane and beryllium oxide.

Thus, while the statutory powers of both DEQE and DPH appear to be enough to encompass regulation of low-level waste generation, storage and transportation, those powers are thus far unexercised. The interaction of some future exercies of power with partially preemptive federal law is, of course, a matter for speculation.

Siting

The Massachusetts Hazardous Waste Facility Siting Act, M.G.L. ch. 21D, utilizes the identical definition of "hazardous waste" quoted above, and thus potentially applies to the siting

of a low-level waste management facility. Chapter 21D establishes an unusual balance between traditional local control over land use decisions and total state preemption of local authority in siting major facilities. Under the Act, a community cannot flatly reject a proposed hazardous waste management facility if a developer selects a site within its borders and can meet state management and design standards. However the host community can negotiate with the developer on measure above and beyond state licensing requirements that make the facility more acceptable to the community. These measures can include provisions to mitigate or reduce potential negative impacts from the facility or to compensate the community for impacts that cannot be avoided.

The major steps of the siting process are:

- The developer submits a Notice of Intent (NOI) to site the facility.

- The host community creates a Local Assessment Committee (LAC) to represent the community and abutting communities in negotiations with the developer.

- The Hazardous Waste Site Safety Council determines whether the proposal is feasible and deserving of state assistance through the siting process.

- The Department of Environmnetal Management (DEM) conducts briefing sessions for public information and comment.

- The Council awards technical assistance grants to host and affected abutting communities to study the proposed project.

- The developer prepares a Project Impact Report on environmental and socioeconomic impacts.

- A siting agreement is negotiated between the developer and Local Assessment Committee.

- The Council determines any compensation to be made to abutting communities.

- The local Board of Health issues or denies a site assignment pursuant to M.G.L. ch. 111, sec. 143.

- DEQE and the community issue or deny the necessary permits and licenses.

Of course, this outline is somewhat stylized, and the steps in the process obviously overlap to a considerable extent.

The Site Safety Council's regulations make this process applicable to the siting of facilities for the management of wastes which have been "defined, classified or listed by the Department of Environmental Quality Engineering as hazardous pursuant to regulations issued under the authority of G.L. c. 21C." 990 CMR 3.00. Thus, since DEQE has thus far refrained from defining low-level waste as hazardous waste, the Site Safety Council's regulations do not apply to the siting of a low-level waste management facility. The regulations could be made to apply, however, either by means of a relatively modest amendment to 990 C.M.R. 3.00 or by action of DEQE.

Section 16 of Chapter 21D provides:

> No license of permit granted by a city or town shall be required for a hazardous waste facility which was not required on or before the effective date of this chapter [July 15, 1980] by such city or town.

Section 16 does not, on its face, prohibit cities and towns from affecting the development of a low-level waste facility through the exercise of their powers under the Zoning Act, M.G.L. c.40A, the Wetlands Protection Act, M.G.L. ch. 131, sec. 40, or the laws authorizing Boards of Health to assign sites for potentially hazardous actions or enterprises. M.G.L. c. 111, sec. 143. Nevertheless, in keeping with the principles of Board of Appeals v. Housing Appeals Committee, 363 Mass. 35, 294

N.E.2d 393 (1973), discussed in section 2A of this report, such local powers could probably not be exercised so as to frustrate the siting of objectives of the Act. Nor, of course, could they be used to block any alternative siting process adopted pursuant to a compact.

It is clear that local governments are free to protect the environment of their communities through the exercise of local zoning by-laws. See Golden v. Selectmen of Falmouth, 358 Mass. 519, 265 N.E.2d 573 (1970). Authority for such local regulation can be found in the general grant of authority of the Zoning Act. The purposes section of the 1975 revision of that Act states:

> [The] objectives for which zoning might be established include, but are not limited to, the following: to conserve health;...to facilitate the adequate provision of water suplly,...; to conserve the value ofland...including the conservation of naatural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the city or town,...; and to preserve and increase amenitites by the promulgation of regulations to fulfill said objectives. Said regulations may include but are not limited to restricting, prohibiting, permitting or regulating:
>
> 1. uses of land, including wetlands and lands deemed subject to seasonal or periodic flooding;
>
> * * *
>
> 4. noxious uses;
>
> 8. the development of the natural, scenic and aesthetic qualities of the community.

Except as noted above with respect to local exercises of power that frustrate state policy, as expressed by state law or regulation or by interstate compact, local exercises of control over development through zoning by-laws are the final authority of such development. Of course, a local government must comply with the procedural requiremnts of the zoning Act in exercising this authority. These requirements include: preparation of a zoning map reasonably describing the area, M.G.L. ch. 40A, sec. 4;

a public hearing before the planning board, M.G.L. ch. 40A. sec. 5; two-thirds vote of the town meeting or city council, id.; the right of appeal to an impartial board of appeals for variances, M.G.L. ch. 40A, sec.12; and the right of review in Superior Court. M.G.L. ch. 40A, sec. 17.

The zoning power can thus be used effectively to restrict development which has the potential of being environmentally hazardous. There also exists specific nonzoning local power for environmental protection, however. For example, the provisions of the Wetlands Protection Act, supra, require approval by a local Conservation Commission prior to the removal, drilling, dredging or alteration of any wetland. The Act requires the Conservation Commission to set forth an "order of conditions" for each proposed project which will protect the various wetland interests enumerated in the Act.

Local authority under the Wetlands Protection Act is subject to supervision by DEQE. Within ten days of the Conservation Commission's order of conditions, the applicant, an owner of abutting land, any ten residents of the city or town where the land is located, or the Commissioner of DEQE can appeal the order to DEQE. The Department will then make an independent determination and issue a superseding order, setting forth its own conditions regulating the proposal. In this way, DEQE can assure that uniform principles and practices are applied throughout the Commonwealth and that no state poicy objectives are unduly undermined by local Conservation Commissions.

Finally, chapter 111, section 143 provides:

> No trade or employment which may result in a nuisance or be harmful to the inhabitants, injurious to their estates, dangerous to the public health, or may be attended by noisome or injurious odors shall be established in a city or town except in such a location as may be assigned by the board of health thereof after a public hearing has been held thereon...

This section thus gives local boards of health the power, after public hearings, to assign a location within the city or town to any activity which may possibly pose a hazard to public health. Such an assignment power may be used to divert the activity to a site less likely to pose environmentat hazards. Again, however, site assignments are appealable to DEQE, and therefore the local site assignment power cannot be utilized to frustrate state policy or interest.

As noted, the site assignment process is specifically incorporated into the siting process of the Massachusetts Hazardous Waste Siting Act. That Act also includes a provision for a comprehensive environmental review of any proposed hazardous waste management facility. Whether or not the regulations issued under the Siting Act are made to apply to the siting of a low-level waste facility, the environmental review provisions of the Massachusetts Environmental Protection Act (MEPA), M.G.L. c.30, secs. 61-62H, will certainly apply. MEPA establishes a procedure by which the state exercises a review function over state-sponsored or state-permitted actions with substantial environmental impacts. Under this procedure, an environmental impact report (EIR) would have to be prepared prior to any siting of a low-level waste facility, incorporating an analysis of all environmental impacts to be anticipated during the facility's lifetime. The EIR is an information and planning

document, and MEPA does not require that any particular actions be undertaken in response to the information gathered in the EIR. Rather, the EIR is intended to assure that the full environemntal consequences of state decisions are considered at a time when these consequences can be ameliorated or avoided.

Superimposed on the various other requirements that affect the siting of a low-level waste facility are the provisions of the Nuclear Power and Waste Disposal Voter Approval and Legislative Certification Act (Chapter 503 of the Acts of 1982), M.G.L. ch. 164 App. secs. 3-1 to 3-9. Chapter 503 requires separate approvals by the General Court and by a majority of voters in a statewide referendum before a low-level waste facility can be sited in the state.

Under Chapter 503, once a proposed low-level waste facility has received all necessary federal, state and local permits, a petition for approval must be filed with the General Court. The legislature may then review the facility proposal and indicate its approaval of it by passing a resolution certifying that both "superior" technology and a "superior" site are included in the proposal, "from the combined standpoints of overall cost, reliability, safety, environmental impact, land-use planning and avaoiding social and economic dislocation." M.G.L. ch. 164 App., sec. 3-4. The resolution must be accompanied by an appendix of facts supporting the legislature's findings. M.G.L. ch. 164 App., sec. 3-6.

Once the General Court has passed such a resolution, the

Secretary of the Commonwealth must submit it to thevoters at the first state-wide general election held at least 120 days thereafter. M.G.L. ch. 164, App., sec. 3-4. If the voters approve of the resolution, then the facility may be built.

Operation

As noted above, DEQE's current hazardous waste regulations do not apply to the operation of a low-level waste facility. Such a facility, therefore, would be subject, in general, only to the applicable regulations of federal law. Nevertheless, at least three types of state laws are likely to have a distinct impact on the operation of a low-level waste facility.

The first of these are the regulations under the Clean Waters Act, M.G.L. c.21, secs. 26-53. That Act prohibits any person from discharging pollutants into waters of the Commonwealth, without a currently valid permits, unless exempted by regulation. M.G.L. c.21, sec. 43. These permits incorporate regulatory effluent limitations promulgated by DEQE for various types of discharge. In addition, the Act provides remedial measures for hazardous spills and accidental discharges. The Act requires anyone who is responsible for such a spill to report it to the Division of Water Pollution Control (DWPC) and thereafter to contract for its immediate containment and cleanup. All persons responsible for a spill are jointly and severally liable for these costs, as well as for the costs of DWPC's investigation of the spill, for any damage to public resources and of the restoration of the area. Bratcher v. Cirillo Bros. Petroleum Products, Inc., 379 Mass. 912, 393 N.E.2d 933 (1979).

A similar provision appears in the Massachusetts Oil and Hazardous Material Release Prevention and Response Act (the "Superfund" law), M.G.L. c.21E. Section S(a) of that law provides:

> (1) [T]he owner or operator of a site from or at which there is or has been a release or threat of release of oil or hazardous material; (2) any person who at the time of storage or disposal of any hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material; (3) any person who by contract, agreement, or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site...from or at which there is or has been a release or threat of release of hazardous material; (4) any person who, directly or indirectly, transported any hazardous material to transport, disposal, storage or treatment sites from or at which there is or has been a release or threat of release of such material; and (5) any person who otherwise caused or is legally responsible for a release or threat of release ofoil or hazardous material from a site, shall be liable, without regard to fault, (i) to the commonwealth for all costts of assessment, containment and removal incurred...relative to such release or threat of release, (ii) to the commonwealth for all damages for injury to and for destruction or loss of natural resources, including the costs of assessing and evaluating such injury, destruction or loss, incurred or suffered as a result of such release or threat of release, and (iii) to any person for damage to his real or personal property incurred or suffered as a result of such release or threat of release.

Like the Clean Waters Act, the Superfund law provides a remedial mechansim when an accidental spill or long-term leakage of hazardous waste occurs. The same definition of "hazardous material" utilized in Chapter 21E is:

> any material, in whatever form, which, because of its quantity, concentration, chemical, corrosive, flammable, reactive, toxic, infectious or radioactive characteristics, either separately or in combination with any substance or substances, constitutes a present or potential threat to human health, safety, welfare, or to the environment, when improperly stored, treated, transported, disposed of , used, or otherwise managed. M.G.L. ch. 21E, sec. 2 (emphasis added).

The Chapter thus can be utilized for clean-up of a low-level radioactive waste site, in an appropriate case.

The final state statute affecting the operation of a low-level waste facitlity to be considered here is M.G.L. c. 111F (the "Right to Know" law). That Act sets forth four principal duties for firms which produce, handle, use or store toxic and hazardous substances. First, such firm must prepare a summary notification form listing such substances, and provide it to the city or town in which they are located, as well as make it available to its workers or their collective bargaining representatives. Second, for each individual substance, the firm must have available a material safety data sheet, containing relevant information about safe handling and use of the substance. Third,the firm must label all containers of tozic and hazardous substances which are used or stored in the workplace. Fourth, the firm must provide notice to its workers concerning their rights of access to the information required to be maintained.

Conclusion

The statutes and regulations outlined in this section form a complex patchwork of requirements that can, or will, affect the generation, storage, transportation, handling, management or disposal of low-level waste. Many of these provisions can affect all aspects of low-level waste handling, not merely the aspect under which they are categorized here. Moreover, the precise regulatory utilizaqtion of hazardous waste laws in the field of low-level waste is, as yet, a matter of speculation. As long as the proper interaction of federal and state regulatory

activity remains unresolved, much of the state's regulatory power may remain unexercised.

3B. WHAT GENERAL PRINCIPLES SHOULD APPLY TO THE DRAFTING OF AN INTERSTATE COMPACT FOR THE MANAGEMENT AND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE SO AS TO MINIMIZE ITS CONFLICT WITH SUCH STATUTES AND REGULATIONS?

Any interstate compact seeking to provide a framework for the mangement of low-level radioactive waste will be negotiated and adopted against a background of regultory activity, including the specific statutes cited in Section 3A of this report, which directly or indirectly affect such management. Because the compact cannot be written on a blank slate, it is necessary for its drafters to be aware of this background of regulation.

Of course, awareness of existing laws and regulations is only a necessary predicate for a properly drafted compact. A strategy for accomodating, preempting or otherwise accounting for such laws and regulations is also needed. This strategy, in turn, may need to be expressed or implied in the language of the Compact itself.

The problem of reconciling conflicts and overlaps among the provisions of law of the various levels of government is virtually as old as the federal system of government itself. When provisions conflict or overlap, the applicable rules of supremacy and preemption noted in section I of this report dictate which provisions are applicable and which are null and void. In

general, federal law (including the provisions of an interstate compact approved by Congress) will take precedence over state and local law. Also in general, Constitutional provisions take precedence over statutes and regulations.

Nevertheless, these general statements are subject to some limitations. First, a court will usually attempt to give deference to legislation and regulatory acts, and will therefore be reluctant to declare any such acts void, if it is possible to give them an interpretation which avoids a conflict or to conceive of a means in which the conflict can be reconciled without invalidating the act. Yetman v. City of Cambridge, Mass. App. , 389 N.E.2d 1022 (1979). Second, a compact itself may state or imply how conflicting and overlapping state requirements are to be treated. In such circumstances general principles of statutory construction will give way to the specific principles contained in, or inferred from, the compact.

A number of strategies for dealing with conflicts and overlaps are possible. At one extreme, it is possible to devise a Compact which is intended to be the exclusive source of regulation of the affected activity. Such a compact should state expressly that all state and local regulations affecting the subject matter are preempted by the compact. The result would be that all state laws and regulations affecting the activities would be nullified to the extent of that effect.

At the other extreme, it is possible to draft a Compact which will leave all existing state laws and regulations intact and also preserve the right of states to enact new laws and

regulations governing the affected subject matter. Many existing interstate compacts include such provisions, in recognition of the continuing sovereign rights of each party to exercise its powers as it sees fit:

> Nothing in this compact shall be construed to repeal or prevent the enactment of any legislation or prevent the enforcement of any requirement by any signatory state imposing any additional condition or restriction to further lessen the pollution of waters within its jurisdiction. New England Interstate Water Pollution Control Compact. Art. VII, M.G.L. ch. 21 App.,sec. 1-1.
>
> Nothing in this compact shall be construed to limit the jurisdiction or activities of any participating government, agency or officer thereof, or any private person or agency. Northeastern Water and Related Land Resources Compact, Art. IX, M.G.L. ch. 91 App., sec. 4-1.
>
> Nothing in this compact shall be construed to:
>
> * * *
>
> 2. Limit or restrict the powers of any State ratifying the same to provide for the radiological health protection of the public and individuals, or to prohibit the enactment or enforcement of State laws, rules or regulations inteded to provide for such radiological health protection. New England Compact on Radiological Health Protection, Art. VII, M.G.L. ch. 111, App., 1-2.
>
> Nothing in this compact shall be construed to limit the powers of any signatory state or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries. Atlantic Marine Fisheries Compact, Art. IX, M.G.L. ch. 130 App., sec. 1-1.
>
> Nothing in this compact shall be construed to prohibit the enactment or enforcementof state laws, rules or regulations intended to aid in [the] prevention, control and extinguishment [of forest fires] in such state. Northeastern Interstate Forest Fire Protection Compact, Art. XIII, M.G.L. ch. 132 App., sec. 1-1.

Between these two extremes, there are other possible strategies. Compacting states may wish to preserve some, but not all state laws, and the right to enact some, but not all, new legislation or regulation. In such circumstances, it may be useful

to consider what types of state laws and regulations are to be preserved and which are to be null and void. For example, it may be desirable to provide that all state laws and regulations that conflict with the provisions of the Compact shall be null and void. Such a strategy would allow states to act whenever the Compact is silent on a particular point, but would forbid them from issuing laws or regulations differing from the Compact's provisions.

A different strategy might be to allow state laws and regulations which are more stringent than those contained in the Compact, and thus only to invalidate laws and regultions which are less stringent than the Compact's provisions. In some Compacts, this strategy might be employed if the desire is to minimize the possibility of conflict between the Compact and state laws, without leaving the states entirely free to accept or ignore the Compact's provisions.

In other circumstances, however, allowing all more stringent state laws and regulations would not necessarily minimize conflict between such laws and the Compact's provisions. A Compact which has development, planning or management, as well as regulatory functions, for example, might be greatly frustrated if states are free to be more stringent in regulations without regard to the development or management objectives of the Compact.

In California v. City of South Lake Tahoe, 466 F. Supp. 527 (E.D. Cal. 1978), the federal district court interpreted the provisions of the Tahoe Regional Planning Compact, entered into between the states of California and Nevada, and approved by

Congress in 1969. That Compact created the Tahoe Regional Planning Agency (TRPA) with the power to adopt and implement a regional land use plan. The state of California sought a declaratory judgment from the Court that the highway improvement activities of TRPA within the state were subject to the approval of the California Tahoe Regional Planning Agency (CRTPA). The court pointed to specific language in the Compact which stated:

> Every such ordinance, rule or regulation [adopted by TRPA to effectuate its regional plan] shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory. (466 F. Supp. at 527) (emphasis added by court).

The court then stated:

> [T]he Compact permits CTRPA to set higher standards even if such standards conflict with the TRPA plan....
>
> * * *
>
> [T]he "equal or higher standard" provision should be given its literal meaning and...CTRPA should be premitted to adopt higher standards applicable to the California portion of the basin irrespective of whether such standards conform to the TRPA plan. 466 F.Supp. at 542-43.

This language expressly authorizing more stringent state regulation may be interpreted to allow a state to frustrate the development, planning or management golas of an interstate compact.

All of the current proposals for a Northeast Interstate Low-Level Radioactive Waste Management Compact are designed with development, planning and management objectives, as well as regulatory objectives. Thus, if the ostates wish to minimize the conflict between the Compact and state law, it may be desirable to implement a drafting strategy which will assure that all state laws (and only such laws) which unduly frustrate the achievement

of the Compact's objectives are invalidated.

Implementation of such a strategy can conceivably take two forms: (1) If the Compact is silent on the question of which state laws and regulations are to be invalidated, it is possible that a Court would construe the Compact to have the meaning desired. (2) Since the first implementation strategy is not free of doubt as to how a court might actually rule, the alternative strategy is to include within the Compact a statement of what state laws and regulations are to be permitted and which are to be invalid.

In California v. South Lake Tahoe, supra, the state also was seeking a declaration that TRPA was subject to the California Environmental Quality Act (CEQA), which requires that environmental impact reviews be conducted before certain types of governmental actions are undertaken.

The court held that the language quoted above meant that California had the right to impose the CEQA provisions on TRPA projects. The court also stated in dictum that application of the CEQA to TRPA "is precluded unless the Compact reserves to California the right to impose such requirements...." Id.

On the basis of this decision, it is possible to foresee a court's interpreting a Regional Compact that is silent on the issue of state laws and regulations to preclude the states from adopting or enforcing environmental safeguards more stringent than those contained in the Compact itself. Such an interpretation is not compelled by the South Lake Tahoe decision, however, especially if the Compact is drafted so as to contemplate clearly that additional requirements and regulation

will be established by the states. Language referring to state requirements, for example, would likely be relied on by a court as a basis for upholding state enactments in the face of a Compact's silence with respect to party state power to adopt such enactments.

Moreover, while a court may well be willing to construe silence in a Compact as meaning that states are precluded from interfering with the development or management objectives of a Compact while being more stringent in their regulation. Certainly such a construction is consistent with the principle that an enactment may regulate a subject matter covered by a superior law if the purpose of the superior law can be acheived in the face of the enactment. Yetman v. Cambridge, supra.

Nevertheless, the issue is not free of doubt. An alternative strategy, therefore, could be an an explicit statement of the circumstances in which states may and may not act. Such a strategy would comport with the observation in Opinion of the Justices, 344 Mass. 770, 776, 184 N.E.2d. 353 (1962), "a compact should be an ascertainable agreement to whcih the parties have manifested mutual assent." Such language may be as follows:

> To the extent not prohibited by federal law, each party state may impose requirements or regulations more stringent than the provisions of this Compact, other federal law, or the law of the host state. No state may impose requirements or regulations which unduly interfere with the reasonable achievement of the policies and purposes of this Compact.

This approach is to be preferred over the generalized statement contained in the current Northeast Compact redraft that

states are required to "have the capability to host a regional facility in a timely manner." Note that the latter language does not purport to prohibit anything, but rather merely states an affirmative obligation. In the absence of any express statement in the Compact that any state laws and regulations of any description are invalid, a court which is presented with a particular state enactment is likely to give this oblique statement of obligation an interpretation that avoids invalidating the state enactment, if such an interpretation is possible. At most, therefore, the language will be interpreted to prohibit provisions that bar facilities outright or that impose procedures which necessarily prolong the siting process beyond what is "timely." It seems unlikely that the language would be interpreted to prohibit the imposition of siting procedures which are almost sure to result in site rejection, or which will produce in long delays if even scant opposition is expressed.

4A MAY AN INTERSTATE COMPACT FOR THE MANAGEMENT AND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE SPECIFY PROCEDURAL RULES AND STANDARDS OTEHR THAN THOSE OF THE FEDERAL ADMINISTRATIVE PROCEDURE ACT?

In section 2B of this report, the question of whether a regional commission established by interstate compact can be considered a federal agency was considered. As noted there, the courts have generally looked at the degree of federal supervision of the activities of such a commission in deciding the issue and, in general, they have concluded that such commissions are not federal agencies.

By its terms, the Administrative Procedure Act (APA) applies only to the actions of federal agencies. 5 U.S.C. sec. 551(1). Assuming that the regional commission established by a low-level waste compact is not a federal agency, then the APA clearly does not govern its procedures. It would therefore be perfectly acceptable to specify procedural rules and stan+ards for the commission other than those of the APA.

Even if the commission were deemed to be a federal agency, the compact could exempt it from the APA. A number of federal agencies have been given statutory exemptions from part or all of the requirements of the APA. These include, for example, the

Renegotiation Board (50 U.S.C. App. sec. 1221), Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975); and the former agencies of the Economic Stabilization Program, Plumbers Local Union v. Construction Industry Stabilization Committee, 479 F.2d 1052 (Em.Ct.App. 1973). The APA itself also exempts certain types of agency actions from its provisions. See, e.g., 5 U.S.C. sec. 553(a)(2) (exempting regulations relating to grants from the notice requirements of section 553); 5 U.S.C. sec. 554 (exempting proceedings based solely on inspections, tests and elections from the requirement that adjudicatory proceedings be conducted before an impartial hearing officer). Such exemptions have routinely been upheld in the courts. NLRB v. Union Bros., Inc., 403 F.2d 883 (4th Cir. 1968); Rodriguez v. Swank, 318 F.Supp. 289 (N.D.Ill. 1970), aff'd, 403 U.S. 901 (1971).

This is not to say that an interstate compact may authorize a regional commission to operate under any procedures the compact specifies, no matter how arbitrary. Certainly the U.S. Supreme Court has recognized that constitutional constraints may restrict the rulemaking or adjudication procedures of administrative bodies, even when the APA does not. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978). Thus, even where administrative actions are not required to be conducted pursuant to the APA, the Constitution requires that the essentials of due process be observed. United States v. Libby, McNeil & Libby, 107 F.Supp. 697 (D.Ak. 1952). In addition, some provision for judicial review of such actions would be constitutionally mandated. Roslindale Cooperative Bank

v. Greenwald, 638 F.2d 258, 261 (1st Cir. 1981).

Conclusion

The Administrative Procedure Act is only one possible means of satisfying the procedural and judicial review requirements of the U.S. Constitution. By its terms, it need not apply to a regional commission created by interstate compact. Therefore, as long as the demands of due process are satisfied in some manner, there is no need for the standards and rules of the APA to be specified as applicable to the regional commission.

4B. MAY SUCH A COMPACT PROVIDE FOR JUDICIAL REVIEW EXCLUSIVELY IN STATE COURTS OR, ALTERNATIVELY, DESIGNATE A SPECIFIC FEDERAL COURT TO HAVE EXCLUSIVE JURISDICTION TO REVIEW DECISIONS MADE UNDER THE COMPACT?

Provisions for judicial review proposed for the regional low-level waste compact present different issues depending upon the nature of the parties to the litigaton. Three classes of cases can be distinguished: (a) suits between states which are parties to the compact; (b) other cases in which a state, a state agency, or the compact commission is joined as a defendant; and (c) cases brought against state or private entities on claims arising under the compact. Each class of cases is discussed below.

Suits Between States

Suits brought by a party state against other party states lie within the original jurisdiction of the Supreme Court under Article III of the Constitution and 28 U.S.C. sec. 1251(a)(1). In Texas v. New Mexico, 103 S.Ct. 2558 (1983), the Supreme Court held that the Court's jurisdiction to resolve controversies between two States includes "a suit by one State to enforce its compact with another State or to declare rights under a compact."

103 S.Ct. at 2567. The Court added:

> "The mere existence of a compact does not foreclose the possibility that we will be required to resolve a dispute between the compacting States." Id. citing Virginia v. West Virginia, 206 U.S. 290, 317-19 (1907).

As the decisions cited make clear, the "mere existence" of an interstate compact does not bar access to the original jurisdiction of the Supreme Court. It is also clear that states may not assert sovereign immunity as a bar to jurisdiction in suits brought by other states. Virginia v. West Virginia, supra, 206 U.S. at 318-19.

No case squarely decides, however, whether states may, by interstate compact, renounce access to the Supreme Court's original jurisdiction, and no compact has been found to contain such a clause. In holding that it had original jurisdiction in Texas v. New Mexico, for example, the Court observed that the compact there at issue "clearly contemplates some independent exercise of judicial authority," but "does not expressly address the rights of States to seek relief in the Supreme Court." 103 S.Ct. at 2567. The question of the validity and enforceability of a compact term expressly excluding the original jurisdiction of the Supreme Court thus remains unanswered.

Suits Brought Against State Agencies or the Compact Commission

The Eleventh Amendment to the U.S. Constitution bars suits against states and state agencies from being brought in the federal courts without the consent of the defendant state. Agencies established by interstate compact may similarly enjoy Eleventh Amendment immunity. Petty v. Tennessee-Missouri

Bridge Commission, 359 U.S. 275 (1959). Not all compact commissions enjoy Eleventh Amendment immunity, however. In rejecting a claim to immunity raised by the Tahoe Regional Planning Agency, the Supreme Court stated:

> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited languge of the Amendment. Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

The Court there rejected the agency's immunity claim because both compact states, California and Nevada, disclaimed any intent to confer immunity on the agency, and both the terms of the compact and the actual operation of the compact agency were inconsistent with the claimed immunity. See 440 U.S. at 401-02. Thus the question presented, both in suits against state agencies and in suits against the compact commission is whether the states involved have waived their Eleventh Amendment immunity.

Waivers of Eleventh Amendment immunity may be express or implied. In Petty v. Tennessee-Missouri Bridge Commission, supra, the Supreme Court observed that, where a waiver is claimed to arise from an interstate compact:

> [T]he Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law. Delaware River Comm'n v. Colburn, [310 U.S. 419 (1940)]. In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises. 359 U.S. at 279.

The Court there held that a sue-and-be-sued clause in the interstate compact made clear that the states accepting the compact had waived their Eleventh Amendment immunity from suit under the compact. 359 U.S. at 280.

The most current draft of the regional low-level waste compact grants the Commission the right to "appear as an intervenor or party in interest before any court of law" (Article V(i)(12)) and contemplates suits against the Commission in Article V(n). Under such terms, party states will be considered to have waived the Eleventh Amendment immunity with respect to suits brought against the Commission. This waiver could extend by implication to suits brought against state agencies unless a compact provision were explicitly to reserve Eleventh Amendment immunity in respect of such suits. Thus, as the draft compact now stands, it is likely that both the Commission and the state agencies involved could be sued in federal court on claims arising under the compact.

Federal Court Jurisdiciton

As discussed in section 2B of this report, approval of a regional low-level waste compact by an act of Congress transforms the compact into federal law. The federal-law character of the compact means that suits arising under the compact may be brought in federal court under "federal question" jurisdiction provided in 28 U.S.C. sec. 1331. It also means that Supreme Court review of final decisions of state courts may be had on certiorari of final decisions of state courts in cases in which compact terms are construed or enforced. See Cuyler v. Adams, 449 U.S. 433, 438-39 (1981).

Certiorari review of state court decisions on interstate compacts was expressly affirmed by the Supreme Court in Delaware River Joint Toll Bridge Commission v. Colburn, 310 U.S. 419, 427-28 (1940). In that case, the Court held that an interstate compact sanctioned by Congress "involves a federal 'title, right, privilege or immunity' which when 'specially set up and claimed' in a state court may be reviewed here on certiorari."

The federal-law status of congressionally approved interstate compacts also provides federal court jurisdiction under the "federal question" provisions of 28 U.S.C. s. 1331. League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974). This basis of jurisdiction has been criticized by some legal scholars. See 13 Wright, Miller & Cooper, Federal Practice and Procedure sec. 3563, at 421 (1975); Engdahl, "Construction of Compacts: A Questionable Federal Question," 51 V. L. Rev. 987, 1025 (1965). But see Note, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64

Georgetown L.J. 87 (1975).

In another phase of the Lake Tahoe litigation, the Supreme Court was asked to rule that claims arising under the Lake Tahoe compact are within federal court "federal question" jurisdiction, buth the Court did not reach the issue since it held that the claims were within federal court jurisdiction under the Civil Rights Act of 1871, 42 U.S.C. sec. 1983, and 28 U.S.C. sec. 1343. Lake_County_Estates_v._TRPA, supra, 440 U.S. at 398-400. While the Supreme Court has yet to consider the question directly, it seems likely that existing federal question jurisdiction may be utilized to bring cases arising under interstate compacts in the federal courts.

Drafting a Judicial Review Clause

In view of the issues discussed above, there is no need in drafting a judicial review clause for the regional low-level waste compact to address the original jurisdiction of the Supreme Court, except in the unlikely event that the party states should wish to exclude use of that jurisdiction to challenge a state's compliance with its obligations under the compact.

The question of a waiver of Eleventh Amendment sovereign immunity rights should be addressed, however, with respect to both state agencies and the compact commision. If the compact is silent on this point, the question must be resolved through litigation interpreting the compact. While such litigation is likely to result in a finding of a waiver under the present draft compact terms, this result is not necessarily clear with respect to state agencies and, at any rate, may not reflect the wishes of

the party states.

Finally, if nothing is said about federal court jurisdiction in the compact, cases "arising under" the compact are likely to be held to be within existing federal court jurisdiction under 28 U.S.C. s. 1332. As observed in section 2B of this report, this section may be set aside by the terms of the compact and its authorizing Act of Congress. For example, if it were desired to confine litigation arising under the compact to state courts, or even to a specified state court, there would, in principle, be no reason that the parties could not accomplish that result through an explicit compact term accepted by Congress. Although such cases would lie within the federal judicial power as defined in Article III of the Constitution, the Congress need not grant jurisdiction over all such questions to the lower federal courts. Any argument that some constitutionally established federal court must be available to hear such cases seems satisfied in the compact context by the certiorari jurisdiction of the Supreme Court to review final decisions of state courts in compact cases.

The most recent draft of the regional compact provides that: "All actions brought by or against the Commission...may be heard in any court of competent jurisdiction." Article V(n). To the extent that such actions "arise under" the compact, the Lake Tahoe case indicates that such actions would be within the federal question jurisdiction of the federal courts. The provision would also allow state court jurisdiction to the extent that existing state statutes provide for such jurisdiction. Once jurisdiction is established in any court, the question of

sovereign immunity would arise with respect to actions both against the compact commission and against state agencies involved in activities affected by the compact. As noted, this question should be resolved through explicit provisions included in the compact.

5A. UNDER EXISTING LAW, WHAT PARTIES CAN BE HELD LIABLE FOR ADVERSE HEALTH EFFECTS OR ENVIRONMENTAL IMPAIRMENT ARISING OUT OF THE DESIGN, OPERATION, MAINTENANCE, OR POST-CLOSURE CARE OF A LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT OR DISPOSAL FACILITY?

B. WHAT STANDARDS OF LIABILITY APPLY TO SUCH PARTIES?

C. IS THE LIST OF POTENTIALLY LIABLE PARTIES AND THEIR STANDARD OF LIABILITY AFFECTED IF THE FACILITY IS LOCATED ON FEDERALLY OWNED PROPERTY OR IF THE FACILITY IS OWNED OR OPERATED BY A STATE AUTHORITY?

D. WHAT STRATEGIES ARE AVAILABLE FOR ALTERING THE RULES OF LIABILITY?

The traditional common law in Massachusetts is that, if persons engage in "ultrahazardous" or abnormally dangerous activities that pollute the environment, they may be subject to strict liability for all injuries resulting from such pollution. This rule of liability was first applied in Ball v. Nye, 99 Mass. 582 (1868), a case in which the plaintiff sued for damages resulting from the discharge of "filthy matter" which percolated through the soil from the defendant's vault under his barn into the plaintiff's cellar and well. In directing that a verdict be entered for thepalintiff, the Supreme Judicial Court stated:

> [T]he defendant was bound to so construct his vault that the contents thereof should not percolate into the plaintiff's cellar and well, and, it being conceded that percolations did pass through, to the plaintiff's injury, such percolations were evidence of negligence, upon which the plaintiff was entitled to a verdict. 99 Mass. at 583-84.

In 1975, the Supreme Judicial Court reaffirmed that Massachusetts law imposes strict liability for ultrahazardous activities. In Clark-Aiken Co. v. Cromwell-Wright Co., 367 Mass. 70, 77-78, 323 N.E.2d 876 (1975), the Court traced the origin of strict liability in Massachusetts to Ball v. Nye, and stated the rule that strict liability will be imposed when, in light of the surrounding circumstances, an unusual or extraordinary activity creates an unacceptable level of risk. 367 Mass. at 88-90. An unacceptable level of risk can be the result either of an activity which itself creates an extraordinary risk or of an activity with a more usual level of risk carried out in surroundings where that risk is increased.

The rule of strict liability does not mean that, whenever a person suffers injury after an encounter with an ultrahazardous activity, he or she will be able to recover damages from the landowner on whose property the activity took place. The Clark-Aiken v. Cromwell-Wright decision makes it clear that the doctrine of strict liability will not be applied when the defendant can show that the injury was caused by an "act of God" or by the intervening act of a third person. 367 Mass. at 90, n.21. In addition, strict liability will not be imposed unless the plaintiff is injured as a direct result of the risk created. Kaufman v. Boston Dye House, 280 Mass. 161, 169, 182 N.E. 297 (1933).

The rule of strict liability has been codified in the American Law Institute's Restatement (Second) of Torts. Section 519 of the Restatement provides:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Guidelines for determining what activities might be abnormally dangerous within the meaning of this rule are contained in section 520. The criteria include:

(a) the existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Note that nothing in the rule of strict liability necessarily compels the conclusion that either the generation, storage, transportation or disposal of low-level waste is necessarily abnormally dangerous. Indeed, the criteria suggested by the Restatement may lead to the exact opposite conclusion. Thus, a technologically sophisticated, closely regulated management facility may not, in fact, pose a high degree of environmental risk and may not be inappropriate to the place where it is carried on. Moreover, the central assumption of the state's participation in the siting and development of such a facility is that its value would outweigh its dangerous attributes.

In addition, the evaluation of a low-level waste facility according to the criteria outlined may be quite different from the evaluation of other low-level waste activities. Thus, a management facility might be found, in an appropriate case, not to be an abnormally dangerous activity, while, in a different case, an activity which results in the generation of low-level waste might be held to a strict liability standard.

The question of what waste-related activities can be the subject of a strict liability action has not yet been considered by the Massachusetts courts. In New Jersey, however, the issue has been considered. In New Jersey v. Ventron, 19 ERC 1505 (N.J. 1983), the New Jersey Supreme Court adopted the doctrine of strict liability for cases involving toxic materials. The court stated:

> A landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others.... [T]hose who use, or permit others to use, land for the conduct of abnormally dangerous activities are strictly liable for the resultant damages. 19 ERC at 1509.

Balancing the criteria listed in the Restatement, the court concluded:

> [T]oxic wastes are "abnormally dangerous," and the disposal of them, past or present, is an abnormally dangerous activity. ...[O]ne engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, "the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it." 19 ERC at 1511, quoting Restatement (Second) of Torts sec. 520, Comment h.

The case before the New Jersey court involved the seepage of mercury from the site of a mercury processing operation into a tidal estuary. Similar activity, involving the discharge of oil

wastes, sludge and contaminated water from an oil reprocessing and canning facility onto adjacent property and a nearby lake, was also found to be a basis for imposing strict liability in Department of Transportation v. PSC Resources, Inc., 175 N.J.Super. 447, 419 A.2d 1151 (L.Div. 1980).

However, it is clear that the holdings of these cases are not limited to the deliberate discharge of toxic wastes to land or water. In City of Bridgeton v. B.P. Oil, Inc., 146 N.J.Super. 169, 369 A.2d 49 (L.Div. 1976), the court imposed strict liability for the mere storage of toxic pollutant substances. The case involved an underground oil storage tank which developed a leak. The court stated:

> [T]this is the proper time to extend the concept of strict liability in this State to those who store ultrahazardous or pollutant substances.
>
> * * *
>
> [T]he possessor of a pollutant keeps it on his premises at his peril. If it escapes he is answerable to one who suffers a provable loss thereby. The policy of the law in this State and of society in general make this a case of strict liability.... 369 A.2d at 53-54.

The New Jersey v. Ventron court relied heavily on the statutory provisions of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to 23.11z (the "Spill Act"). Section 8 of that Act provides that the New Jersey Spill Compensation Fund "shall be strictly liable, without regard to fault...for all direct and indirect damages no matter by whom sustained." N.J.S.A. 58.10-23.11g(a). Among the types of damages specifically enumerated in that section, for which the fund can be liable are: damages to real and personal property; lost income due to property damage; reductions in property values; natural resource damages and the loss exceeding 10 percent of the income

derived from activities related to damaged property or natural resources. N.J.S.A. 58:10-23.11g(a)(1) to (5).

However, the statute states that the Fund's liability is not to be limited to the enumerated types of damages, and does not expressly exclude bodily or emotional injuries. Moreover, the Act specifically provides that its provisions are to be "liberally construed to effect its purposes." N.J.S.A. 58:10-23.11x. See also GATX Terminals Corp. v. Department of Environmental Protection, 86 N.J. 46, 429 A.2d 355 (1981). The statute further provides:

> Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substances [which the Department of Environmental Protection removes under the Act] shall be...strictly liable, jointly and severally without regard to fault, for all cleanup and removal costs. N.J.S.A. 58:10-23.11g(c).

The decision in New Jersey v. Ventron illustrates the degree to which the courts are willing to look to the legislature for guidance on the characterization of waste-related activities. Chapter 21E of the General Laws, quoted in section 3A of this report, is certainly analogous to that of the Spill Act. On the basis of that language, a court could conclude, as was done in New Jersey, that the storage of all forms of polluting material is an abnormally dangerous activity, for which strict liability ought to be imposed. It cannot be said with certainty, however, in the absence of statutory language directing such a ruling, that Massachusetts would follow New Jersey's lead on this point.

On the basis of the foregoing analysis, it can be concluded that Massachusetts has available the doctrine of strict liability for abnormally dangerous activities to utilize in providing a

remedy for damages arising out of low-level waste activities. Application of the doctrine is not automatic, however, and will depend upon a finding that the activity at issue is, in fact, abnormally dangerous. That determination, in turn, will be based upon the application of the criteria noted above.

Finally, unless the Massachusetts courts were to follow the lead of New Jersey, separate determinations would have to be made for each activity upon which the imposition of liability is sought to be based. Thus, for example, in an action brought against the generators of waste disposed of at a particular facility and the operator of that facility, two separate issues are presented: first, whether the generation of waste is an abnormally dangerous activity; and second, whether the operation of a disposal facility is also abnormally dangerous. Moreover, it would not be unthinkable for the courts to rule that certain types of low-level waste generating activities are abnormally dangerous, while others are not.

In the absence of a determination that low-level waste activities are abnormally dangerous, the standard of ordinary care would be applied as the basis for imposing liability for negligence or maintenance of a nuisance. In a negligence action, a plaintiff must bear the burden of alleging and proving negligence on the part of the defendant. For example. in Gauvreau v. Gulf Refining Co., 288 Mass. 54, 192 N.E. 220 (1934), the plaintiff was denied recovery when she was unable to demonstrate that the defendant's negligence had caused gasoline from an underground storage tank to seep into her well. To be

successful in an action for damages under a traditional negligence theory, the plaintiff would have to show that the defendant failed to take precautions againts a risk that would have been apparent to a reasonable person in the defendant's profession or business.

An action for nuisance is similar, except that the initial focus of inquiry is on a condition of land, rather than on the conduct that gave rise to that condition. An unreasonable use of land which interferes with a plaintiff's health, or use or enjoyment of property, may be actionable as a nuisance. For example, in Lenari v. Town of Kingston, 348 Mass. 355, 203 N.E.2d 808 (1965), the court held that a waste disposal facility could be a nuisance if, by reason of unreasonable operation and maintenance practices, it causes injury to others.

By federal regulation, disposal of low-level waste received from other persons may be permitted only on land owned in fee by the Federal or a state Government. 10 C.F.R. sec. 61.59(a). Because of this restriction, the question arises as to whether the governmental owner of a low-level waste facility site can be liable for injuries arising out of the facility's operation, on the same basis as other potentially responsible parties. This question has two aspects: First, the issue is whether liability can be imposed on the basis of mere ownership of the land on which the facility is located, in the absence of any other contribution on the part of the landowner to the abnormally dangerous activity or to the negligence or nuisance upon which liability is to be based. Second, the issue is presented as to whether the federal or state government can be held liable, under

their respective waivers of sovereign immunity, in the absence of any allegation or evidence of negligence or nuisance.

With respect to the first of these issues, the state and federal Superfund laws indicate that, in those cases to which they apply, liability can indeed be imposed for "mere ownership" of a site. The federal Act states:

> [T]he owner or operator of...a facility...shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

The state law quoted in section 3A of this report is, of course, similar.

The policy which justifies these provisions appears to be that the owner of land which is the subject of a Superfund clean-up is the principal beneficiary of such a clean-up and, as such, ought not to receive the windfall that would arise if the value of the land were restored at no cost to him or her. This policy may well be sound in the case of liability for clean-up, but its application to cases involving common law liability for personal injury or property damage may be open to question. Nevertheless, it is at least arguable that the property owner who leases land for the specific purpose of undertaking an abnormally dangerous activity should be held to the same standard of strict liability as the person who engaged in the activity directly.

With respect to the second issue, however, the U.S. Supreme

Court has made it clear that the Federal Tort Claims Act, 28 U.S.C. sec. 2674 does not extend to claims based on strict liability for abnormally dangerous activities Dalehite v. United States, 346 U.S. 15 (1953). Thus, even if a court were to conclude that Massachuseets would impose strict liability on a landowner for the personal injuries or property damage resulting from a low-level waste facility located on the property, the federal government would still not be strictly liable, and it would be necessary to prove federal negligence in order to recover damages. See Jennings v. United States, 530 F.Supp. 40 (D.D.C. 1981).

Again, the Massachusetts statute is similar. Chapter 258, section 2 provides:

> Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances.... (emphasis added).

On the basis of the foregoing analysis, four principal strategies for altering the rules of liability applicable to low-level waste facilities are suggested. First, the legislature could enact a statute clarifying the application of the common law rules noted above. Such a statute might, for example, settle the issue of what activities are abnormally dangerous as a matter of law, and thus eliminate the need for the issue to be resolved on a case-by-case basis, according the specific facts before the court. Alternatively, such an enactment could be incorporated into an interstate compact negotiated by the state. If the

latter strategy were followed, it may be necessary to adopt language formally imposing strict liability, since other states may not have adopted the concept in their common law.

Second, to the extent that the state believes that the initial imposition of liability under the principles of common law or any statutory midification thereof may result in damage judgments against parties who are unable to pay them, it may develop "financial responsibility" requirements for such parties. A financial responsibility requirement is a legal mandate that anyone engaged in a particular activity--such as the generation of low-level waste or operation of a low-level waste management facility--must establish a certain level of liability insurance or comparable means of satisfying a damage claim arising out of that claim. A financial responsibility requirement does not, strictly speaking, alter the underlying rules of liability applicable to such activities. Nevertheless, it does attempt to assure that such rules result in imposition of liability only upon those financially able to incur such liability.

Third, to the extent that the judgment is made that a potential exists for catastrophically huge damages arising out of low-level waste activities, and that financial responsibility requirements sufficient to pay such damages are not feasible--either because insurance coverage is unavailable or its cost would be prohibitively high--it is possible to establish by statute or compact the contingent liability of some outside source of funds. Thus, for example, if commercial insurance is available only up to a particular limit of liability, and it is deemed necessary to provide a mechanism for assuring the

availability of funds to pay damage claims above that limit, an institutional mechanism for collecting and investing the necessary funds (for example, from those who utilize a disposal facility) could be established. A statute or compact could then provide that, in the event that the total liability of persons initially liable under existing statutory or common law rules exceeds the resources available to them (or the limits of coverage required under a financial responsibility requirement), the institutional mechanism could be utilized to provide compensation.

Fourth, the state could make the judgment that imposition of liability above certain huge limits is so socially disruptive that the tort system should not be called upon to handle such claims. This is essentially the judgment made under the Price-Anderson Act, 42 U.S.C. sec. 2210(c), which limits the aggregate liability for damages arising out of accidents at nuclear power plants to $560 million. This limitation of liability was found to be constitutional in Duke Power Co. v. Carolina Environmental Study Group, Inc., 435 U.S. 59 (1978).

Conclusion

At least in theory, principles of strict liability for abnormally dangerous activities are vailable for use in tort actions arising out of personal injury or property damage resulting from low-level waste activities. Imposition of strict liability, however, will depend on a finding that the particular activity at issue is abnormally dangerous. Nothing in the common

law compels the conclusion that low-level waste generation, storage, transportation or disposal will necessarily be deemed to be abnormally dangerous. The applicable standard of liability, therefore, might well be clarified by statute or interstate compact. In addition, provision for the financial responsibility of the persons upon who liability is imposed might be made. Finally, a need may be perceived for some type of statutory provision restricting or transferring liability in the event of an environmental catastrophe which results in damages beyond the resources of those upon whom liability is initially imposed.